Supreme Court, U.S.
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NO. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PREM S. SARIN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

When a target of a grand jury investigation validly asserts his Fifth Amendment privilege and refuses to produce an incriminating personal document, may the government nonetheless compel production of that document, indict him based on evidence derived from it, and introduce that evidence at trial, through the device of "act of production" immunity.

The government is using the device of "act of production" immunity with increasing frequency; it asserts the right to use documents obtained through that device against the person it has immunized; and this assertion presents a very important issue not yet resolved by this Court.

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THE UNITED STATES OF AMERICA,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Prem S. Sarin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The judgment of the court of appeals is reported at 10 F.3d 224 (4th Cir. 1993). Its opinion is set forth in the appendix (App. A).

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1993. Petitioner's timely filed petition for rehearing in the court of appeals was denied on December 15, 1993. (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 6002 provides in pertinent part:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --

(1) a court or grand jury of the United States, . . .

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony *or other*

information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(emphasis added).

INTRODUCTION AND STATEMENT OF THE CASE

This petition for certiorari presents an important and unresolved question relating to subpoenas calling for the production of incriminating documents: whether the government can override a valid assertion of the Fifth Amendment privilege by a grant of "act of production" immunity and thereby use the document or evidence derived from it against the immunized witness. The government uses the grant of "act of production" immunity with increasing frequency, knowing that it is a questionable practice. The government asserts the right to use incriminating evidence obtained through a grant of act of production immunity against the immunized witness and will continue to do so until this Court resolves the issue. The issue goes to the heart of the privilege. The petition for certiorari should be granted to decide this important unresolved issue.

Factual Background. Dr. Sarin was the Deputy Director of the Laboratory of Tumor Cell Biology of the National Cancer Institute ("NCI"), one of the

National Institutes of Health. In March 1991, a grand jury was investigating whether Dr. Sarin had received payments from private pharmaceutical companies in an improper manner.[1] The government issued a subpoena *duces tecum* calling, *inter alia*, for the production by Dr. Sarin of documents reflecting all "payments received" from private pharmaceutical companies. By necessary implication this subpoena required Dr. Sarin to tell the grand jury: (1) whether he had received any such payments that were reflected in documents; and (2) from whom. Dr. Sarin refused to comply with the subpoena on the ground that compliance would require him to incriminate himself in violation of the Fifth Amendment. Because the documents were personal rather than corporate, Dr. Sarin had a valid Fifth Amendment privilege;[2] and the government has never contended otherwise.

Upon Dr. Sarin's refusal to produce the requested documents on Fifth Amendment grounds, the government obtained an immunity order pursuant to 18 U.S.C. § 6002 purporting to immunize only Dr. Sarin's "act of producing" the documents. The order omitted the standard language -- from the statute -- immunizing "any information" directly or

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1 Government rules permit NCI employees to receive some fees from outside companies provided the payments are properly reported to the government.

2 *See United States v. Doe*, 465 U.S. 605 (1984); *Braswell v. United States*, 487 U.S. 99, 104 (1987).

indirectly "derived" from the immunized testimony. Dr. Sarin then moved to quash the subpoena. After the district court denied his motion to quash, Dr. Sarin produced documents responsive to the subpoena. Among those produced was a document reflecting receipt of a payment from LyphoMed, Inc. ("LyphoMed"), a biomedical research company.

Prior to Dr. Sarin's production of this document, the government was unaware of Dr. Sarin's dealings with LyphoMed. After receiving the document, the government obtained records from LyphoMed confirming the payment to Dr. Sarin. Using this evidence, the government and the grand jury indicted Dr. Sarin for failing to report receipt of this payment.

District Court Proceedings. The grand jury returned a four-count indictment against Dr. Sarin.[3] Count Four of the indictment charged Dr. Sarin with making a false statement in failing properly to disclose the LyphoMed payment. Count One charged him with embezzlement of funds he received from Homburg Degussa Pharma ("Degussa"), another pharmaceutical company. Count Two charged Dr. Sarin under a different theory with respect to the Degussa funds, alleging that the payment constituted supplementation of his salary in violation of 18 U.S.C. § 209. Count Three charged Dr. Sarin with failing properly to disclose the Degussa payment.

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3 The district court had jurisdiction over the case under 18 U.S.C. § 3231.

The government's introduction of the evidence obtained from LyphoMed in the grand jury formed the basis of Count Four of the indictment. Dr. Sarin vigorously contested the government's use of that evidence, arguing in a motion to dismiss the indictment that such use violated the grant of immunity and the Fifth Amendment. His motion to dismiss was denied.

At trial, the government used the same evidence to convince the jury of Dr. Sarin's guilt on the LyphoMed count, as well as his guilt on the other counts. Dr. Sarin's defense was that although the handling of and accounting for the Degussa funds had not been appropriate, he had no criminal intent. The government's theory -- supported in part by the LyphoMed evidence -- was that Dr. Sarin engaged in a pattern of failing to disclose payments from outside companies. At every stage, Dr. Sarin objected to the government's use of the LyphoMed evidence on the ground that it was derived from his compelled production of documents pursuant to a grant of immunity. Although the government conceded that it would not have learned of the LyphoMed payment but for Dr. Sarin's immunized production of documents, (JA 76; 4/10/92 Tr. 55), the trial court admitted the evidence. The trial court's theory was that the immunity order only protected Dr. Sarin from use against him of his "act of production." Because the government did not introduce evidence of his "act of production," the trial judge permitted the evidence and indictment to be presented to the jury.

In addition to its evidence relating to Degussa and LyphoMed, the government introduced at trial evidence of Dr. Sarin's dealings with a third pharmaceutical company, Pfizer, Inc. ("Pfizer"). The government's purpose in introducing the Pfizer evidence was plainly to bolster its theory that Dr. Sarin had a pattern of engaging in improper dealings with pharmaceutical companies.[4] The government urged in summation that Dr. Sarin's dealings with Pfizer and Degussa were "as like as two peas in a pod." (JA 231; 7/7/92 Tr. 36). Obviously, this analogy applied with equal force to the LyphoMed evidence.

The jury convicted Dr. Sarin on the LyphoMed count and two of the Degussa counts. It acquitted on Count Two. The trial court granted Dr. Sarin's post-trial motion for judgment of acquittal on the LyphoMed count (Court Four) for reasons unrelated to the grant of immunity. It found that there was insufficient evidence as to that count and that the count failed to charge an offense.

The court rejected Dr. Sarin's claim that the use of the LyphoMed evidence required dismissal of Counts One and Three as well. It ruled that use of the LyphoMed evidence did *not* violate the Fifth Amendment or the immunity statute, and that the evidence would have been admissible on the

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4 Dr. Sarin's argument that admission of the Pfizer evidence violated Fed. R. Evid. 404(b) was rejected by the trial court and the court of appeals.

Degussa counts even if Court Four had been dismissed before trial for legal insufficiency.

Court of Appeals Proceedings. Dr. Sarin appealed from the judgments of conviction on the ground that the government's use of the LyphoMed evidence against him breached the promise of immunity and violated the Fifth Amendment. The Fourth Circuit affirmed.

The court of appeals, however, failed to address the principal question raised in Dr. Sarin's appeal: whether the government could properly use documentary evidence, obtained through "act of production" immunity, against the immunized witness. The court therefore never reached the question whether the government's use of the LyphoMed documents, to which it was led by Dr. Sarin's immunized act of production, to indict and convict him was consistent with the government's stringent obligation under *Kastigar v. United States*, 406 U.S. 441 (1972), to leave an immunized witness in the same position as if his Fifth Amendment privilege had been honored.

Instead, it held that even assuming that the trial court's admission of the LyphoMed evidence was error, it was harmless beyond a reasonable doubt because the LyphoMed count had been dismissed post-trial. App. 5-6. Although the issue raised in Dr. Sarin's appeal plainly required application of authority from this Court governing the effect of the use of immunized evidence, *e.g.*, *Kastigar*, the court of appeals avoided applying this relevant authority

by failing to decide the critical Fifth Amendment issue.

Dr. Sarin's petition for rehearing and suggestion for rehearing in banc were denied summarily. App. 8-9.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN IMPORTANT QUESTION LEFT UNRESOLVED BY DECISIONS OF THIS COURT: WHETHER THE GOVERNMENT MAY PERMISSIBLY PROSECUTE A WITNESS USING EVIDENCE OBTAINED PURSUANT TO A GRANT OF "ACT OF PRODUCTION" IMMUNITY

This case presents an important statutory and constitutional issue: whether the government may use evidence obtained from an individual pursuant to a grant of "act of production" immunity to secure an indictment and conviction of the individual.

There is no doubt that Dr. Sarin had a valid Fifth Amendment privilege to refuse to respond to the documentary subpoena he received in this case. In *Fisher v. United States*, 425 U.S. 391 (1976), this Court recognized testimonial components inherent in the act of complying with a subpoena for documents:

> The act of producing evidence in response to a subpoena . . . has

> communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the *existence of the papers demanded* and their possession or control by the [individual]. It also would indicate the [individual's] belief that the papers are those described in the subpoena.

425 U.S. at 410 (emphasis added).

The subpoena in this case called for production of documents reflecting "payments received." In effect, it called upon Dr. Sarin to testify whether or not he had documents reflecting payments received from pharmaceutical companies. It put him to the choice of saying "yes," producing the document, and incriminating himself; or saying "no" and committing perjury or contempt.[5] This is the Fifth Amendment dilemma in its starkest form.

Where the answer to this question is incriminating, and the documents are personal not corporate, it is embraced within the Fifth Amendment privilege and may not be compelled from the witness absent a grant of immunity. *United States v. Doe*, 465 U.S. 605, 613-14 (1984).

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5 In effect, a subpoena requires the recipient to answer the question, "Do you have documents fitting this description?" *See* R. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 Va. L. Rev. 1, 11-12 (1987).

The government never contested the applicability of the privilege. Instead, it sought to do an end run around the privilege by resort to so-called "act of production" immunity. Although the practice of granting act of production immunity received some encouragement in *Doe*, 465 U.S. at 617 n.17, the government has long known it is a questionable practice. Roger M. Olsen, Acting Assistant Attorney General of the Tax Division, gave a speech on April 18, 1986 expressing apprehension about the effect of granting immunity in connection with a subpoena for documents. Commenting on *Doe*, Mr. Olsen stated:

> There remains a question not addressed by the Supreme Court in *Doe*, a question relating to the derivative use limitation of Section 6002, which provides, in relevant part, that "no testimony or other information compelled under the order (*or any information directly or indirectly derived from such testimony* or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." Thus, what limitations there are upon the ability of the Government to successfully use the fruits of immunized production remain in question.

Olsen Speech at 19 (emphasis added).[6]

The government's fear has direct foundation in Justice Marshall's concurrence in *Fisher*. Justice Marshall reasoned that when the testimonial element in producing documents constitutes a disclosure that the documents exist, "the immunity grant must extend to the testimony that the document is presently in existence. Such a grant will effectively shield the contents of the document, for the contents are a direct fruit of the immunized testimony -- that the documents exist -- and cannot usually be obtained without reliance on that testimony." *Fisher*, 425 U.S. at 433-34 (Marshall, J., concurring); *see also* Mosteller, 73 Va. L. Rev. at 46 (where existence of documents is in dispute, use immunity must effectively bar any subsequent use); *In re Sealed Case*, 791 F.2d 179, 781-82 (D.C. Cir.) (Scalia, J.), *cert. denied sub nom., Wiggins v. United States*, 479 U.S. 924 (1986) (the fact that the contents of subpoenaed tapes "are *unprivileged* does not mean that they will necessarily remain *untainted*") (emphasis in original).

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6 Commentators have suggested that the government's fear that a grant of act of production immunity to a target would seriously impede subsequent efforts to prosecute the target explains the government's reluctance to seek statutory immunity in *Doe*. *See, e.g.*, L. Rosenblatt, *The Production of Business Records After Braswell: Where We've Been, Where We Are, Where We May Be Going*, 67 Taxes 231 (April 1989).

Notwithstanding the government's fear of the consequences of granting immunity to a target, the case law reflects the government's increasing use of "act of production" immunity to obtain evidence which it may later use in a prosecution of the target. *See e.g., United States v. Tapert,* 1993 U.S. LEXIS 12551 (6th Cir. May 19, 1993), *cert. denied,* 114 S.Ct. 442 (1993); *In re J.W.O.,* 940 F.2d 1165 (8th Cir. 1991); *In re Grand Jury Proceeding, Special April 1987,* 890 F.2d 1 (7th Cir. 1989); *In re Sealed Case,* 791 F.2d 179 (D.C. Cir.)(Scalia, J.), *cert. denied sub. nom., Wiggins v. United States,* 479 U.S. 924 (1986).

This is an important constitutional issue going to the heart of the Fifth Amendment dilemma.

II. THE GOVERNMENT'S USE OF EVIDENCE DERIVED FROM DR. SARIN'S IMMUNIZED ACT OF PRODUCING DOCUMENTS VIOLATED THE IMMUNITY STATUTE AND THE FIFTH AMENDMENT

Authority of this Court relating to the Fifth Amendment and the federal immunity statute establishes that the government's use of evidence derived from Dr. Sarin's immunized act of producing documents violated both the Fifth Amendment and the immunity statute.

The Fifth Amendment's proscription of the use of compelled testimony derives from "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or

contempt . . . ." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Any compulsory process that relies on the suspect's "moral responsibility for truthtelling" is accordingly prohibited by the Fifth Amendment, because the decision whether to comply with the process requires the suspect to choose among incriminating disclosure, perjury or contempt.

The decision whether to produce documents in response to a document subpoena requires the individual to whom the subpoena is directed to make such a choice. The recipient may elect either to produce incriminating documents; answer untruthfully that she has no responsive documents; or refuse to comply, thus subjecting herself to the sanction of contempt. Because the act of responding to a document subpoena subjects the respondent to the *Murphy* trilemma, the Fifth Amendment applies in full force.

A grant of immunity allows the government to overcome an assertion of the Fifth Amendment privilege and to compel the witness to testify only because it removes the threat that a truthful answer will enhance the government's position in a prosecution against the claimant. To override the witness's claim of privilege, the grant of immunity must provide protection commensurate with that which she would enjoy under the Fifth Amendment. *Kastigar v. United States*, 406 U.S. 441, 449 (1972). Thus, to supplant the protection afforded by the Fifth Amendment privilege, the grant of immunity must leave the witness in the same position in which she

would have been had she successfully asserted the privilege.

That is the precise, explicit and unambiguous holding of *Kastigar*. In *Kastigar*, this Court upheld the constitutionality of the statute pursuant to which immunity was granted to Dr. Sarin. The Court's conclusion that immunity adequately supplanted the Fifth Amendment privilege was based on the statute's express prohibition of any use of the compelled testimony or anything derived from it. Thus, the court in *Kastigar* concluded that because the statute "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, . . . it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453 (emphasis in original).

By granting immunity, the government strikes the following bargain with the witness: in exchange for the testimony which the government could not otherwise obtain, the government guarantees the witness that neither the testimony nor any information derived from it will be used against him in any criminal case. *See United States v. North*, 920 F.2d 940, 948 (D.C. Cir. 1990) ("*North II*"), *cert. denied*, 111 S.Ct. 2235 (1991); *see also United States v. Hampton*, 775 F.2d 1479, 1491 (11th Cir. 1985). "[I]t is only this promise that compels the defendant to testify in spite of his constitutional privilege." *Id.*

Under *Kastigar* and its progeny, prosecution of a previously immunized witness can occur without violating the Fifth Amendment only in the

narrowest of circumstances: when the government can "prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460. The burden on the government in making such a showing is a heavy one. *Id.* at 461-62.

Where the government fails to carry this heavy burden, the introduction of immunized evidence at trial has been held to require reversal of the convictions. *See, e.g., United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) ("*North I*"). In this case, no *Kastigar* hearing was held because the government *admitted* that all of the evidence used in the grand jury and at trial related to LyphoMed was derived from Dr. Sarin's compelled testimony. (JA 76; 4/10/92 Tr. 92). The government thus confessed to an absolute breach of its promise to Dr. Sarin that the evidence he provided would not be used against him. Despite its promise of immunity, the government used that very evidence to obtain the indictment and the resulting convictions. Dr. Sarin thus was left in an unequivocally different and worse position by testifying pursuant to the false promise of immunity. Application of *Kastigar* and its progeny would necessarily have resulted in reversal of Dr. Sarin's convictions.

III. THE COURT OF APPEALS ERRED IN FAILING TO DECIDE THIS ISSUE

The court below never reached Dr. Sarin's claim that the government's use of evidence derived from his act of producing documents constituted a breach of its promise of immunity and a violation of the Fifth Amendment. Consequently, it failed to undertake an analysis of this claim under *Kastigar* and its progeny.[7] If we are correct in our view of the Fifth Amendment and the immunity statute, however, a *Kastigar* analysis is plainly required.

Instead of undertaking a *Kastigar* analysis, the court of appeals treated this case as if no Fifth Amendment issue were presented. It applied a standard derived from cases in which the defendant is acquitted on one count in a multi-count indictment to hold that because Dr. Sarin ultimately was acquitted -- post-trial -- of the LyphoMed count, introduction of the immunized LyphoMed evidence was not fatal to the other counts. App. 5-6.

The proper resolution of Dr. Sarin's appeal requires resolution of the important question presented here: whether the government may use a grant of "act of production" immunity to obtain documents from a target and subsequently present

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[7] Should this Court decline to grant this petition, petitioner submits that vacation of the court of appeals' decision with instruction to apply the relevant case law of this Court in analyzing Dr. Sarin's Fifth Amendment claim is warranted.

evidence derived from those documents to indict and convict the target. This important question has fueled academic debate in the ten years since this Court's decision in *Doe*, and is the subject of increasing litigation -- and confusion -- in the lower courts.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Dated: January 1994

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

No. 92-5738

PREM S. SARIN,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
M.J. Garbis, District Judge.
(CR-91-455-MJG)

Argued: October 1, 1993

Decided: November 16, 1993

Before WILKINSON and WILLIAMS, Circuit Judges,
and CHAPMAN, Senior Circuit Judge.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Williams and Senior Judge Chapman joined.

COUNSEL

ARGUED: Alan Baron, HOWREY & SIMON, Washington, D.C. for Appellant. Dale Preston Kelberman, Assistant United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF:** W. Neil Eggleston, Laura S. Shores, Dianne S. Pickersgill, HOWREY & SIMON, Washington, D.C., for Appellant. Gary P. Jordan, United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

WILKINSON, Circuit Judge:

Appellant contends that improperly admitted evidence relating to a count on which the district court granted acquittal so affected the jury's consideration of the remaining counts that it may not constitute harmless error. We reject this contention and affirm the convictions.

I.

Dr. Prem S. Sarin was the Deputy Director of the Laboratory of Tumor Cell Biology of the National Cancer Institute ("NCI"), an agency of the National Institutes of Health ("NIH"), from 1975 to 1991. As a result of congressional inquiries into mismanagement

at NIH, the government initiated a grand jury investigation of Dr. Sarin's relationship with outside pharmaceutical companies.

In early 1991, the grand jury issued a subpoena *duces tecum* to Sarin as Custodian of Records of P.S. Consulting, a sole proprietorship fully owned by Sarin and under whose name he conducted outside consulting. Sarin was granted statutory immunity, pursuant to 18 U.S.C. § 6002, for his "act of producing" documents mandated by the subpoena.

Among the documents produced by Sarin was a check stub showing receipt of payment from Lyphomed, Inc., a biomedical research company. The government then obtained records from Lyphomed indicating the payments to Sarin, and interviewed employees of Lyphomed regarding those payments. The government presented evidence obtained directly from Lyphomed to the grand jury, and again at trial, in seeking the indictment and conviction of Sarin for failing to include payments from Lyphomed on his required financial disclosure statements. Despite receiving several payments from Lyphomed, Sarin never submitted to NIH a "Request for Approval of Outside Activity" form, nor did he list the payments in his annual disclosure statement. At trial, the jury convicted Sarin on this charge of making false statements, which was included in the indictment as Count Four.

In addition to convicting Sarin on Count Four, the jury also convicted him on Counts One and Three. Count One charged Dr. Sarin with embezzling the

property of Homburg Degussa Pharma ("Degussa"), another pharmaceutical company. Dr. Sarin was convicted of taking a payment from Degussa, which was intended to support research on an AIDS treatment, for his personal benefit. Count Three concerned Sarin's relationship with Degussa as well. It addressed Sarin's false statements on a "Request for Approval of Outside Activity" form with regard to research conducted on Degussa's behalf. Dr. Sarin substantially understated the extent of his commitment to, and the level of his compensation from, Degussa. Sarin was acquitted by the jury on Count Two, which charged him with unlawfully supplementing his income by accepting the Degussa payment.

Following the jury's verdict, the district court granted Dr. Sarin's motion for judgment of acquittal as to the Lyphomed count. The district court held that Count Four failed to charge an offense, and that, even if it did state an offense, the government failed to present sufficient evidence to convict. The district court upheld the jury's convictions on Counts One and Three, however, finding that there was no prejudicial "spillover" from the evidence presented on Count Four.

In this appeal, Dr. Sarin asserts that the evidence heard at trial regarding his receipt of payments from Lyphomed should have been barred by his grant of immunity. Sarin contends that his Fifth Amendment right against self-incrimination was violated by the introduction of evidence stemming from his protected act of document production. Sarin further argues that this alleged constitutional error infected the jury's

consideration of the other counts against him, and thus that the district court erred in refusing to grant him acquittal on Counts One and Three.

II.

We need not address here Dr. Sarin's challenge to the use of the Lyphomed records. Assuming, without deciding, that there was constitutional error in admitting those records, the error must be considered harmless in this case.

Courts have frequently held that the consideration of evidence -- whether properly or erroneously admitted -- relating to counts on which the defendant was acquitted did not prejudice the defendant with respect to other counts on which he was convicted. These holdings have come in cases where jury verdicts of guilty on some counts in a multi-count case have been set aside. *See, e.g., United States v. Thomas*, 676 F.2d 239, 243 (7th Cir. 1980), *cert. denied*, 449 U.S. 1091 (1981); *United States v. Castro*, 476 F.2d 750, 752 (9th Cir. 1973); *United States v. Berlin*, 472 F.2d 1002, 1009 (2d Cir.), *cert. denied*, 412 U.S. 949 (1973); *National Dairy Prods. Corp. v. United States*, 384 F.2d 457, 462 (8th Cir. 1967), *cert. denied*, 390 U.S. 957 (1968). *But see United States v. Eason*, 920 F.2d 731, 737 (11th Cir. 1990). Similarly, the presentation of evidence relating to counts on which the jury fails to convict the defendant has been held not to prejudice the defendant as to the remaining counts on which the jury did return a guilty verdict. *See United States v. Bernard*, 757 F.2d 1439, 1443 (4th Cir. 1985); *see also United States v. Santana-Camacho*, 931 F.2d 966, 968 (1st Cir. 1991); *United States v. Fairfield*,

526 F.2d 8, 12 (8th Cir. 1975). The general rule recognizes that jurors are capable of following instructions requiring them to consider each count separately, and that acquittal by the court on some counts after a verdict of guilty has been returned does not thereby infect all counts that were before the jury. As one court stated: "[i]t has . . . long been the general rule that testimony related wholly to charges on which there was an acquittal, is not harmful even if it was improperly admitted at trial." *Blassingame v. United States*, 254 F.2d 309, 310 (9th Cir. 1958).

This circuit has also considered the effect of the presentation of evidence on counts set aside by the court after a jury conviction. In *United States v. Wilkins*, 385 F.2d 465 (4th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968), this court set aside the conviction of a defendant on one count of tax evasion while upholding the jury's convictions on the other three counts tried. The court held that "there was substantial independent evidence to support the defendant's convictions" on the other counts, and that "the taint attaching to the presentation of [the discarded count] was not so great as to permeate or materially affect the convictions on the remaining counts." *Id.* at 474.

Our decision in *Wilkins* is relevant here. The customary harmless error inquiry should be undertaken in all cases where an alleged evidentiary error underlies a particular count in a multi-count trial. Applying the general rule described above, we have no difficulty in finding the error harmless here. The evidence used to convict Dr. Sarin on Counts One and Three was quite independent from the Lyphomed

records, as those counts related to transactions with an entirely different pharmaceutical company -- Degussa. This differentiation between the counts ensures beyond a reasonable doubt that any error in admitting the Lyphomed records was harmless. The Lyphomed records simply did not relate to Counts One and Three. There was sufficient evidence to support the convictions on those counts, and the jury was properly instructed on the elements of each separate offense. *See United States v. Thomas*, 676 F.2d at 243. Of course, the evidence with respect to Lyphomed did not reflect favorably on appellant, but that cannot be the test. If it were, it is difficult to see how any conviction in a trial in which the defendant was acquitted on a count where an alleged evidentiary error was committed could be sustained.

III.

Because any error relating to the admission of evidence on Count Four would be harmless, and because we find no merit in the appellant's other assignments of error, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 15, 1993

No. 92-5738
CR-91-455-MJG

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

PREM S. SARIN

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK